91-583

No.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., WALTER HENNINGSEN, MELISSA HENNINGSEN, IRENE E.SCOTT and HENNINGSENS, INCORPORATED, on behalf of themselves and all other similarly situated taxpayers,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues; JIMMIE LOU FISHER LUMPKIN, Treasurer of the State of Arkansas; FLOYD G. "BUDDY" VILLINES III, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; and the CITY OF FAYETTEVILLE, ARKANSAS; and all other similarly situated counties and cities; and AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.; MCI TELECOMMUNICATIONS CORPORATION; U.S. SPRINT COMMUNICATIONS COMPANY; TMC OF ARKANSAS, INCORPORATED; LDDS OF ARKANSAS INCORPORATED; COMPUTE-A-CALL OF CENTRAL ARKANSAS, INCORPORATED, and all other similarly situated providers of long distance interstate and international telephone and telecommunications services,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

EUGENE G. SAYRE
JACK, LYON & JONES, P.A.
425 West Capitol Avenue
3400 TCBY Tower
Little Rock, AR 72201
(501) 375-1122
Counsel of Record For Petitioners

PARAGON PRINTING & STATIONERY COMPANY, INC.

QUESTIONS PRESENTED

1. Were the MTS subscriber-members of the Petitioner-class of taxpayers denied their rights to Equal Protection under the Fourteenth Amendment, because § 2 of Act 27 of 1987 discriminatorily imposes Arkansas' Sales Taxes upon charges made to them for MTS interstate telephone service (but not upon charges to subscribers of WATS interstate service, which service utilizes exactly the same transmission equipment and transmits the same messages as MTS service), since the appellate courts of other states have recently found their states' general Sales Taxes unconstitutional on Equal Protection grounds, under very similar circumstances?

2. Were the members of the Petitioner-class of taxpayers denied their right to a fair opportunity to challenge the Sales Taxes in question, as guaranteed by the Due Process Clause of the Fourteenth Amendment, when the four special "appointed" associate justices (a majority) of the Arkansas Supreme Court (who were appointed to serve herein by Governor Clinton, a *defacto* party-litigant) refused to disqualify themselves from participating in this case upon the written request for recusal by the Petitioners, which request alleged the appearance of judicial impropriety; reasonably questioned the special justices' impartiality; and questioned the independence of the judiciary in this case?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are four individuals and a small corporate business who are subscribers to MTS (basic) long distance interstate telephone services. They represent a certified class of some 800,000 taxpayer-subscribers to MTS interstate services in Arkansas. Arkansas' state and local Sales Taxes are discriminatorily imposed by Section 2 of Act 27 of 1987 (Ark. Code Ann. § 26-52-301(3)(A)) upon charges for MTS interstate services. The Petitioners are more particularly described as:

Petitioner Hugh Bosworth is an individual and a resident of Lonoke County, Arkansas. Petitioners Irene E. Scott, Melissa Henningsen, and Walter Henningsen are individuals and residents of Little Rock, Pulaski County, Arkansas. These four taxpayers are subscribers to MTS long distance interstate telephone and telecommunications services.

Petitioner Henningsens, Inc. is a corporation created under the laws of Arkansas that has no subsidiaries or affiliates. This corporate taxpayer operated a full service automobile garage in Little Rock, Arkansas, and was a subscriber to MTS long distance interstate telephone and telecommunication services.

Respondents are representatives of two separate certified subclasses comprised of: (1) state officials charged by law with the collection, administration and distribution of Arkansas' Sales Taxes or officials of local cities and counties in Arkansas wherein local option Sales Taxes are imposed (all of whom are defendants in their official capacities); and (2) a group of corporate entities that are involved in the business of providing long distance interstate telephone and telecommunication services in Arkansas (and are therefore required by law to collect the challenged state and local Sales Taxes from the 800,000 taxpayer-subscriber members of the Petitioner-class). The Respondents are more particularly described as follows:

Respondent Timothy J. Leathers is the currently serving Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration. He is the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondent Jimmie Lou Fisher Lumpkin is the duly elected Treasurer of the State of Arkansas and the person who is charged with disbursing tax funds to state agencies and to county and municipal governments where local option taxes are collected.

Respondents Floyd G. "Buddy" Villines and Patricia Tedford are the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a local option county Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, is a municipality wherein a local option municipal Sales Tax is imposed.

Respondents AT&T Communications of the Southwest, Inc.; MCI Telecommunications Corporation; U.S. Sprint Communications Company; TMC of Arkansas, Incorporated; LDDS of Arkansas Incorporated; and Compute-a-Call of Central Arkansas, Incorporated, are corporate entities that are involved in the business of providing long distance interstate and international telephone and telecommunication services to Arkansas subscribers. By Arkansas statute, these long distance telephone service providers are required to collect the challenged state and local Sales Taxes from members of the Petitioner-class of taxpayers and remit the same to the Commissioner of Revenues.

Intervenor Arkansas Telephone Association, Inc. is an independent corporation that has no subsidiaries or affiliates and is a trade organization composed of approximately 29 local telephone companies supplying local telephone service to taxpayer-subscribers in Arkansas.

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ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Hugh H. Bosworth, Jr., et. al., respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The opinion of the Supreme Court of Arkansas (App. B, *infra*, 2a) is reported at 305 Ark. 598, 810 S.W.2d 918. The Order of the Supreme Court of Arkansas denying the petition for re-hearing is unreported (App. A, *infra*, 1a).

The Findings of Fact, Conclusions of Law, Order and Judgment (App. E, *infra*, 19a) of Chancellor Ellen B. Brantley of

the Pulaski County Chancery Court entered on May 19, 1989, are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, *infra*, 2a) was rendered on June 3, 1991, and a Petition for Rehearing was timely filed by the Petitioners and denied on July 1, 1991 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND JUDICIAL CODE PROVISIONS INVOLVED

U.S. Constitution:

Amendment 14, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution:

Art. 7, § § 1, 4 and 9, are set forth in full in App. F, *infra*, 37a.

Statutes:

Ark. Code Ann. § 26-52-301(3)(A) (as it appeared both before and after the questioned amendment) is set forth in full in App. G, *infra,* 39a.

Judicial Code:

Canons 1, 2, 3, 7 and the Addendum of the Arkansas Code of Judicial Conduct (adopted by *per curiam* orders of the Arkansas

Supreme Court on November 5, 1973, and June 6, 1988) are set forth in App. I, *infra*, 45a.

STATEMENT OF THE CASE

a. Arkansas' Sales Tax on Telephone Service

Prior to the adoption of § 2 of Act 27 of 1987 on February 11, 1987, Arkansas' statutory scheme of Sales Taxes imposed these taxes only upon the charges made to subscribers for *local* telephone services and for *intrastate* long distance telephone services. No Arkansas Sales Taxes were imposed upon charges made by long distance carriers for providing *interstate* and *international* telephone and telecommunications services to Arkansas subsribers. By 1987, more than half of the municipalities and counties in Arkansas also imposed local option Sales Taxes upon the same services that were subjected to the state Sales Taxes.

During the Arkansas General Assembly's regular session in 1987, S.B. 196 was introduced as an "administration bill" (i.e. one sponsored by Governor Clinton as the head of the Executive Department of Arkansas' state government). (R. 298–300; 316–318) Section 2 of S.B. 196, as originally introduced, provided that *all* telephone service, i.e. local, intrastate long distance and interstate long distance services, purchased by Arkansas subscribers would have been subjected to Arkansas' 4% Sales Tax. However, during the two weeks § 2 of S.B. 196 underwent the legislative process, it was amended on three occasions, and was finally enacted into law as § 2 of Act 27 of 1987 on February 11, 1987. [1] (App. H, *infra*, 42a) The practical effect of the adoption of § 2 of Act 27 of 1987 was to extend Arkansas' state and local Sales Taxes to charges made by long distance telephone carriers for providing MTS (basic) interstate telephone service to Arkansas' residential and business subscribers. However, charges for WATS or WATS-

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[1] It is important to note that an AT&T corporate counsel admitted in writing (before this suit was filed) that AT&T's lobbyists and legislative research personnel were involved in the legislative process on Act 27 of 1987. (SR 15)

like or Private Line long distance interstate services sold to both residential and business subscribers were specifically excluded from such Sales Taxes by the provisions of the Act. The Director of the Department of Finance & Administration estimated that this extension of Arkansas' Sales Taxes to out-of-state long distance service charges would generate an additional $5.0 million in "new" state revenue per year.

In early March of 1988, after the provisions of § 2 of Act 27 of 1987 had been in effect for approximately a year, the Petitioners (four individuals, Messrs. Bosworth and Henningsen, and Ms. Henningsen and Ms. Scott, and Henningsens, Inc., an Arkansas corporation operating a small full service automobile garage), all subscribers to only MTS interstate long distance telephone services, instituted this class action suit in Pulaski County Chancery Court (under the "illegal exaction" provisions of Art. 16 § 13 of the Arkansas Constitution) to challenge the constitutionality of the state and local Sales Taxes imposed by § 2 of Act 27 of 1987.[2] The Petitioners' Complaint alleged that the discriminatory imposition of Arkansas' Sales Taxes upon the MTS type of interstate long distance services (and not upon the similar WATS type of interstate services) violated their rights to enjoy the equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution. [3]

The Respondents named in this class action represent two separate subclasses: (1) the officials of the State of Arkansas who are required by law to administer, collect and disburse the

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[2] The Petitioners are not challenging: (1) Arkansas' Sales Taxes imposed upon charges for *intrastate* long distance telephone service (all types are taxed), or (2) the fact that these Sales Taxes were not imposed upon charges for interstate long distance telephone services provided by Private Line Service, which service cannot be accessed by the general public (See ftnt. 4, *infra*).

[3] The Petitioners also alleged in their Complaint that § 2 of Act 27 of 1987 violated the provisions of the Commerce Clause of the U.S. Constitution. The denial of their Commerce Clause cause of action by the trial court was not appealed by the Petitioners, following this Court's decision in the case of *Goldberg v. Sweet*, 488 U.S. 252 (1989).

challenged Sales Taxes, and representatives of the counties and municipalities in Arkansas where local option Sales Taxes are imposed; and (2) the companies who are providers of long distance interstate telephone services (interexchange carriers (IXCs)) in Arkansas that are required by law to collect the challenged Sales Taxes from their subscribers. The Arkansas Telephone Association, Inc. intervened because each of its 29 local exchange carrier (LEC) telephone company members act under various contracts as collecting and remitting agents for one or more of the IXC's with regard to the state and local Sales Taxes in question.

The Petitioners' suit was certified as a class action; the trial court Chancellor denied the Petitioners' request that the challenged Sales Taxes be escrowed; but she did enjoin the IXCs and their agents to maintain billing records, so as to be able to identify the amounts of Sales Taxes paid monthly by their subscribers for MTS interstate long distance service.

At various pretrial evidentiary hearings and at the trial in this case, extensive testimony (either *ore tenus* or by stipulation), stipulations of fact, and documentary evidence were introduced regarding the technical aspects of the various types of interstate and international long distance telephone services provided by the various IXC's to their Arkansas subscribers; how the challenged Sales Taxes were administered by both the Arkansas Revenue Division and these IXC's; and how the various IXCs determined whether the challenged Sales Taxes described in the statute were applicable to the various interstate telephone services they provided.

The evidence herein established that there are two generally recognized types of telephone service subscribers; i.e. *residential* and *business*, each with different rate structures, etc. It was also established that a long distance interstate telephone transmission originates at the subscriber's station (telephone); is transmitted to the LEC's central switching station; and then to the designated IXC's long distance switch. The interstate transmission is then carried by wire, fiber optic cable, microwave or satellite transmission to the IXC's long distance switch in the receiving state; where the signal is picked up by the LEC and transmitted

through its system to the receiving subscriber's station. The total charge for such a long distance interstate telephone transmission is billed to either the originating or receiving subscriber's number; but this charge is divided by FCC and state PSC regulated rates among the originating LEC, the IXC and the receiving LEC. The IXC must pay both the originating and receiving LECs an "access fee" for the right to utilize the local phone systems as part of the interstate transmission.

Some IXCs (e.g. AT&T, MCI and US Sprint) own their own transmission facilities and are referred to within the industry as "facility based carriers." Other IXCs (e.g. Compute-a-Call of Central Arkansas) own no transmission facilities at all; they merely purchase large blocks of WATS services from the "facility based" IXCs and "resell" these long distance services to their subscribers. These IXCs are generally referred to within the industry as "re-sellers." Finally, a third type of IXC (e.g. LDDS of Arkansas) owns some of its transmission facilities and also buys and resells WATS services provided by the "facility based" IXCs.

Generally, the types of, and rates for, long distance interstate telephone services provided by the IXC (under authorization of the FCC or state PSCs) are classified for utility regulation purposes as: (1) MTS, (2) WATS (and WATS-like) and (3) Private Line Services. It was generally accepted from the evidence introduced in this case that the MTS and WATS services were accessible by the general public from any station (telephone); that there were no longer dedicated transmission lines for WATS services; and that today these MTS and WATS classifications were generally differentiated *only* for rate purposes, since both of these types of long distance services utilized exactly the same telephones, transmission lines and switching equipment of both the LECs and the IXC's to transmit the subscriber's interstate messages of voice, data, or images on either MTS or WATS services. The rates for both the MTS and WATS services were time of day, day of week, length of time used, and distance sensitive (with the WATS services having a lower rate per call), but a flat reoccurring

monthly charge was added to the WATS service. [4] (R. 340–342; 583–585)

The General Manager for TMC of Arkansas, Inc. (one of the combination "resellers" and "facility based" IXC's) and Petitioner Melissa Henningsen testified that the reoccurring flat

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[4] The generally understood and accepted description of MTS, WATS and WATS–like, and Private Line Services by the parties in this suit can be described as follows:

(a) *Message Telecommunication Service*. MTS type of service is the regular or basic long distance service provided by all IXCs and is available to any consumer–subscriber in Arkansas. The charge for the MTS type of long distance service is measured by the distance and length of time on each individual call, and the rate per minute on each long distance call varies based upon the time of day and day of week on which the long distance call is placed. This MTS type of service is provided both intrastate and interstate to Arkansas subscriber–customers of the long distance carriers. The MTS service can be used to transmit voice, data or images. This MTS service can be accessed from any station (telephone).

(b) *Wide Area Telecommunication Service* (WATS). WATS service is a long distance service that is available to any customer–subscriber in Arkansas to transmit voice, data and images within a designated geographic area, known as a service area or band. The WATS service can be either an out–bound service or an in–bound 800 service. This 800 service allows the subscriber–customer of a long distance company to receive voice, data or image transmissions at its location in Arkansas directly from callers within the designated geographic area known as a service area or band. WATS long distance service or 800 long distance service each have a monthly reoccurring flat charge, plus a charge (like the MTS charge) that is a per call charge based upon the time of day and day of week on which the long distance call is placed, the length of time the WATS service is utilized on each call, and the geographic distance covered by each call. This WATS service can be accessed from any station (telephone).

(c) *Private Line Service*. Private Line Service is a service which is a dedicated point–to–point service between two specific locations. Access to this service from other telephone lines is not available, on either the originating or terminating end. Calls to or from points not connected by a private line must be provided over some other type of telephone service. Voice, data or images may be transmitted by Private Line Service. The charge for Private Line Service is a flat rate per month which charge is not usage sensitive.

monthly charge for WATS and WATS-like services made it uneconomical for both residential and business subscribers with a low volume of out-of-state long distance telephone calling needs to subscribe to WATS service. Thus, there is a "break even" point at which the interstate WATS services become economically practical to be utilized, based strictly upon a higher volume of out-of-state long distance services needed, by either residential or business subscribers. It is undisputed that *both* residential or business subscribers can subscribe to either MTS or WATS services (there being no prohibition by the regulatory agencies); that most WATS service subscribers also subscribe to some MTS service at the same time; and that most residential and business long distance users with low volume interstate calling needs subscribe only to MTS services. (R. 218-219; 226-230; 246-247; 340-342)

The General Manager of TMC also testified that, because the wording of § 2 of Act 27 of 1987 excludes WATS and WATS-like services from Arkansas' Sales Tax base, that his company's comparably priced MTS or "basic" long distance interstate services were placed at a competitive pricing disadvantage to AT&T's (and the other "facility based" IXC's) WATS line charges, due solely to the extra differential of the 4% to 5% Sales Taxes being imposed upon the "reseller's" basic long distance services and not upon these WATS services provided by the "facility based" IXCs. [5] (R. 229-230)

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[5] The General Manager of TMC testified, in response to questions from Petitioners' counsel (R. 229-230):

Q: In your offering, or TMC's offering of its regular service, do you compete on a price level with any other companies' WATS line services?

A: Price is probably the biggest consideration.

Q: Well, particularly with the application of the tax in this instance, have you made a determination that the tax of five percent has any effect upon the competitiveness or the price being able to be offered by TMC for its basic services versus other services that you compete with?

A: I have. There is not necessarily a one to one relationship with our products and our competitors' products. For example, our basic service may be competitive

At the close of the trial on December 13, 1989, Chancellor Brantley, in her oral discussions with counsel for all parties held against the Petitioners on their Equal Protection Clause cause of action because she held that states were to be given a wide latitude under the Equal Protection Clause to differentiate among classes of taxpayers, and that even a classification based solely upon a regulatory agency's rate structure was sufficient to justify the discriminatory imposition of Arkansas' Sales Tax. However, she closed her discussion by stating (R. 646):

> THE COURT: That's my only recollection of the testimony, and, quite frankly, I want this opinion to be honest. If the Supreme Court doesn't believe that this is enough to allow a different taxing system, then I want them to reverse me. I mean, I do not find that you can tell any difference between MTS and WATS based on anything other than how they are billed, and your election to be billed one way or another depends upon the telephone service outside of local exchanges. [6]

On May 19, 1989, the Chancellor entered her Findings of Fact and Conclusions of Law, Order and Judgment, dismissing the Petitioners' Complaint. (App. E, *infra*, 19a) A Notice of Appeal from this decision was timely filed by the Petitioners to the Arkansas Supreme Court.

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with AT&T WATS service. There is a competitive situation there in that we do charge, and [I] feel like that we have to charge, the five percent sales tax on our basic service, where AT&T does not have to charge the sales tax on their WATS service. So, if all other things were equal, we would be at a five percent disadvantage simply with that situation. And, again, that stairsteps up moving from one product to another competitor, but similarly situated products, one could have the sales taxes applied and one would not have the sales tax applied.

[6] The full test of the trial court Chancellor's discussion with counsel on this point is set out as Appendix J, *infra*, 51a.

b. Due Process Issue

After the issues on appeal to the Arkansas Supreme Court had been fully briefed by all parties and the case had been set for oral argument on November 12, 1990, a majority (four of seven) of the "elected" justices of the Arkansas Supreme Court notified the clerk of that court, in writing, that they were recusing from further participation in this case. In the respective justices' letters of recusal, no reasons were stated for their self determined disqualifications in this case.

Based upon the provisions of Canon 3D of the Arkansas Code of Judicial Conduct (App. I, *infra*, 45a), the Petitioners herein requested (by motion and brief filed on November 19, 1990) that the four recusing justices of the Arkansas Supreme Court reconsider their decisions to disqualify, or, alternatively, that they state for the record in this case the reasons for their individual recusals, so that the parties hereto, independent of these justices, could decide whether such reasons for disqualification could be waived by agreement of the parties. None of the Respondents filed any type of response to the Petitioners' motion in this regard. The Arkansas Supreme Court denied the Petitioners' request for reconsideration in this regard by Order entered on December 10, 1990. (App. C, *infra*, 15a) On December 11, 1990, pursuant to the provisions of Art. 7 § 9 of the Arkansas Constitution, the Chief Justice of the Arkansas Supreme Court wrote to Governor Clinton requesting that he appoint four attorneys to serve as special associate justices in this particular case.

In response to this written request, in letters dated February 1, 1991, Governor Clinton appointed Ms. Elrod and Messrs. Byrd, Pilkinton and Glover to sit as special justices in this case. These special associate justices were chosen by Governor Clinton from a standing list of approximately 100 Arkansas lawyers submitted to the Governor's office by the Judicial Nominations Committee of the Arkansas Bar Association. The Petitioners' counsel filed written requests on March 15, 1991, under the Arkansas Freedom of Information Act, with both the Office of Governor Clinton and with the ABA Judicial Nominations Committee requesting that either or both entities state what requirements or standards were

used in picking these four special associate justices to serve in this case. Both the Office of Governor Clinton and the Chairman of the ABA Committee declined, in writing, to state what standards or requirements were used or what contacts were made in choosing these four special associate justices to sit in this case.

Subsequently, on March 29, 1991, the Petitioners filed a formal Motion Suggesting Disqualification of All Special Associate Justices Appointed by Governor Clinton, and asking all four special associate justices to recuse in this case. The documents attached to the Petitioners' Motion established that Ms. Elrod's spouse (and law partner) and Mr. Pilkinton's mother and father (and law partner) had recently made substantial campaign contributions to Governor Clinton's successful 1990 reelection campaign. The Petitioners also established that the legislative Act in question (§ 2 of Act 27 of 1987) had been an "administration bill" promulgated and sponsored by Governor Clinton and his executive staff; and that the constitutionality of this Act had been defended in this action by Governor Clinton's politically appointed Commissioner of Revenues (i.e. James C. Pledger). Therefore, the Petitioners submitted that all four special associate justices, under the circumstances then present, could not serve without there being an appearance of impropriety or bias, since they were appointed by Governor Clinton who was, at least, a *de facto* litigant in this case. Finally, it was noted that Mr. Glover had, within the year, been appointed as a special associate justice in another "illegal exaction" class action tax case (also involving Petitioners' counsel herein) and that he had written the Court's opinion reversing the victory that the members of the taxpayer-class had secured in the trial court.

The Petitioners alleged in their motion that allowing a litigant in a case to appoint a majority of the Court that would pass upon the constitutionality of § 2 of Act 27 of 1987 (especially where that party refused to state what standards had been used or what contact had been made with such lawyers (and other lawyers not chosen) in appointing the four attorneys to serve in this case) presented circumstances that denied the Petitioners their right to due process of the laws, under the provisions of the Fourteenth Amendment of the U.S. Constitution. The Petitioners also alleged that these appointments by Governor Clinton compromised the

independence of the judiciary and violated the constitutional principle of the separation of powers.

The Petitioners requested that, if these four special associate justices would recuse, then both Governor Clinton and Lt. Governor Tucker (a partner in the law firm representing US Sprint herein) should disqualify from exercising the powers of appointment (under Art. 7, § 9 of the Arkansas Constitution), and, therefore, allow the constitutional power to appoint these four special associate justices to devolve to the president *pro tempore* of the Arkansas Senate. Alternatively, the Petitioners renewed their request that the four regularly "elected" justices reconsider their prior decision and state on the record their reasons for recusing, so as to allow the parties to independently determine whether they could waive such disqualifications. Finally, the Petitioners requested that the Arkansas Supreme Court exercise its general supervisory powers granted in Art. 7 § 4 of the Arkansas Constitution (App. F, *infra*, 37a) to appoint "elected" members of the Arkansas Court of Appeals or "elected" trial judges in Arkansas to fill the four vacancies created by the recusal of the "elected" associate justices of the Arkansas Supreme Court. The Petitioners alleged that there were no other ways to avoid this constitutional conflict and crisis, under the circumstances presented by Governor Clinton's involvement in the appointment of special associate justices to the Court in this case. By Order entered on April 15, 1991 (App. D, *infra*, 17a), the Arkansas Supreme Court denied the Petitioners' requests in this regard and set the case down for oral argument on April 22, 1991.

c. Arkansas Supreme Court's Decision

In an Opinion written by Special Associate Justice Georgia Elrod, and joined in by the three other special associate justices appointed by Governor Clinton, the Arkansas Supreme Court affirmed the trial court Chancellor's decision that the Petitioners had not met their burden of proof that § 2 of Act 27 of 1987 violated their rights of Equal Protection under the Fourteenth Amendment of the U.S. Constitution. Relying upon this Court's then recent decision in the case of *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), the Arkansas Supreme Court refused to apply a "heightened

scrutiny" standard to the Petitioners' challenge to the discriminatory imposition by § 2 of Act 27 of 1987 of Arkansas' Sales Taxes on charges made by the various IXCs for providing MTS and WATS long distance interstate telephone services to the individual members of the Petitioner–class of taxpayers. Instead, applying its interpretation of the "rational basis test" prescribed for use by this Court in Equal Protection Clause challenges to state taxes, the Arkansas Supreme Court hypothesized (based upon its reading of the evidentiary record established herein), that:

> The Legislature may have intended, in the enactment of § 2 of Act 27 of 1987, to encourage large volume users of telephone service, i.e. WATS subscribers, to remain or relocate in Arkansas. We agree with the Chancellor's finding that this basis for the legislation would be rationally related to achieving a legitimate governmental objective [providing tax incentives to commerce as a means to encourage businesses to stay and locate in this state].

The Petitioners filed a timely Petition for Rehearing alleging that: (1) there was no legitimate state purpose served by a tax policy that (a) merely encouraged a high volume use of interstate long distance telephone service, or (b) resulted in granting "facility based" IXCs a competitive pricing advantage over "resellers;" and (2) that, if encouraging business development was the state's purpose for adopting § 2 of Act 27 of 1987, there was no rational relationship between that and the classification of excluded WATS services created by § 2 of Act 27 of 1987, since all Arkansas businesses do not benefit from such classification. Such Petition for Rehearing was denied by Order of the Arkansas Supreme Court on July 1, 1991. (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The Petitioners submit that the two questions presented in this case establish that there are conflicts between the opinion here by the Arkansas Supreme Court, and opinions of this Court and other state appellate courts regarding the proper application of (1) the "rational basis test" of the Equal Protection Clause in challenges to state taxes and (2) the Due Process Clause in allowing a contesting taxpayer to secure a fair hearing. Thus, important reasons, as described by Rule 10.1(a), (b) and (c) of this Court's Rules, exist here to warrant the granting of the Petitioners' Writ. The Arkansas Supreme Court's failure to properly apply any *objective* standards to the facts and law presented in this class action case, as required by this Court's prior decisions, has resulted in a decision in this case that is in direct conflict with a recent decision of the Wisconsin Supreme Court involving virtually the same factual situation. The violation of the Petitioners' due process rights by the appointment of special associate justices of the Arkansas Supreme Court, by what amounts to a *de facto* party-litigant and the refusal of such special justices to recuse upon the request of the Petitioners, creates the appearance of impropriety, reasonably raises the question of the lack of impartiality on the part of such "appointed" special justices, and brings the independence of the judiciary seriously into question. The answers to the questions raised here by the Petitioners can only be supplied by a ruling of this Court, and the Petitioners submit that a decision by this Court on both of the questions they have raised will provide precedents of substantial national importance.

The Petitioners acknowledge that the State of Arkansas has the power to impose a Sales Tax upon charges for long distance interstate telephone services. (Ark. Code Ann. § 26-52-301(3)(A)) However, Arkansas' statutory scheme for imposing these statutory taxes (like that of a growing number of its sister states) does not impose these excise taxes equally upon similarly situated subscribers who should be grouped into the same class, because of the arbitrary exclusion from the Sales Tax base of charges for WATS and WATS-like interstate services. The Petitioners submit that a classification of taxpayers, based solely upon the regulatory rate structure, does not further a legitimate state purpose, and that

the practical effect of the statutory scheme (in its "actuality of operation") is to grant a competitive pricing advantage to facility based IXCs; clearly not a legitimate state purpose. Even assuming, as the Arkansas Supreme Court appears to have held, that the purpose of § 2 of Act 27 of 1987 was to encourage economic development of business within Arkansas (an acknowledged legitimate purpose), the classification resulting from the exclusion of interstate WATS services from the tax base is not rationally or reasonably related to this purpose that has been "hypothesized" by the state supreme court, because not all businesses are provided the benefit.

Forty-five states and the District of Columbia impose some sort of Sales Tax (or other gross receipts based excise tax) upon charges for telephone service. Many thousands of local governmental entities also impose similar local option excise taxes upon telephone service. The amount of Sales Taxes in question in this case alone now exceeds more than $20.0 million, and that figure must be multiplied several times over because of the fact that this same discriminatory statutory scheme for imposing Sales Taxes on charges for interstate telephone service has now been adopted in several other states.

Thus, the Petitioners believe that the Equal Protection question presented here is of substantial national importance to millions of taxpayers who are subscribers to long distance interstate telephone services and that this Court should grant the petition and render a decision giving guidance in this complex area where none exists at this time. The Petitioners also submit that an exercise of this Court's supervisory powers over the state courts is the only way that the Due Process question presented here can be answered, since there is no other effective way to secure a review of an exercise of discretion by state supreme court justices, under circumstances as are presented here.

I. A CONFLICT EXISTS BETWEEN THE DECISION IN THIS CASE AND DECISIONS BY APPELLATE COURTS OF OTHER STATES IN EQUAL PROTECTION CLAUSE BASED CHALLENGES TO STATE TAXES

IMPOSED UPON TELEPHONE SERVICES AND THE DECISION OF THE ARKANSAS SUPREME COURT IS ERRONEOUS.

The Petitioners acknowledge that this Court's previous decisions have long ago established in a taxpayer's Equal Protection based challenge to a state tax, that great deference and wide latitude will be given by the Court to the state legislatures' decisions to create different classifications of taxpayers to meet local economic and regulatory needs; that the classifications will be presumed constitutional and approved if the Act advances a legitimate state purpose and the resulting classifications are reasonably related to that state purpose; that the classifications do not have to be drawn with mathematical precision; and, finally, that a heavy burden of proof is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. See, *Allegheny Pittsburgh Coal Co. v. County Commissioner*, 488 U.S. 336 (1989); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Madden v. Kentucky*, 309 U.S. 83 (1940); and *Carmichael v. Southern Coal Co.*, 301 U.S. 532 (1937).

Though the Petitioners acknowledge that the violation of the Equal Protection Clause by a state tax is probably the hardest constitutional issue for a challenging taxpayer to establish, they submit that there are still "objective" standards that the challenged tax statute must meet under the "rational basis" or "minimum scrutiny" test. To pass constitutional muster, the classification must be reasonable, not arbitrary; it must rest upon some ground of difference having a fair and substantial relation to the object or purpose of the legislation; the classification cannot be palpably arbitrary, feigned or illusory; and the ultimate controlling issue is whether all taxpayers that are within the classification created are treated alike. *Allied Stores of Ohio, supra*, 358 U.S. at 527; *Walters v. City of St. Louis*, 347 U.S. 231, at 237 (1954); and *Royster Guano Co. v. Virginia*, 253 U.S. 412, at 415 (1920).

There have been a number of previous decisions rendered by this Court where state or local taxes were declared to have

violated the provisions of the Equal Protection Clause, either because (1) there was no legitimate state purpose served by the classification (*Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985); *WHYY v. Glassboro*, 393 U.S. 117 (1968); and *Wheeling Steel Corp. v. Gladner*, 337 U.S. 562 (1949)); or (2) the classification was found to be palpably arbitrary, feigned or illusory, and therefore not reasonably related to an otherwise legitimate state purpose (*Allegheny Pittsburgh Coal Co., supra; Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935); and *Royster Guano Co. v. Virginia*, 253 U.S. 419 (1920)).

The Petitioners submit that the classification created by § 2 of Act 27 of 1987 fails the two part "rational basis test" laid down by this Court, because there is neither a legitimate state purpose served by (1) merely encouraging the high volume usage of interstate telephone service, or (2) creating a competitive pricing advantage for "facility based" IXCs over their "reseller" competitors. See, *Metropolitan Life Insurance Co., supra*, *WHYY, supra*, and *Wheeling Steel Corporation, supra*. [7]

a. Conflict with Decisions of Other State Appellate Courts

The Petitioners submit that the decision of the Arkansas Supreme Court in this case conflicts directly with the very recent decision of the Wisconsin Supreme Court in the case of *GTE*

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[7] The Petitioners also originally argued before the Arkansas Supreme Court that the "heightened scrutiny" and "compelling interest" standards should be applied in this case because their First Amendment rights of "free speech" were being abridged by the discriminatory application of the Sales Tax. However, the Petitioners acknowledge that this Court's intervening decision in *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) succinctly stated that a First Amendment issue was not involved under such circumstances. However, the Plaintiffs do note that this Court has already acknowledged the seriousness of a possible Equal Protection violation in this type of situation because the Equal Protection issue was remanded in *Medlock*.

Sprint Communications Corp. v. Wisconsin Bell, Inc., 454 N.W.2d 797 (Wis., 1990), regarding the proper interpretation and application of Equal Protection standards in a challenge to a general Sales Tax imposed upon charges for telephone service. The *GTE Sprint* case was cited to the Arkansas court by the Petitioners, but the court chose not to comment upon this Wisconsin decision, though it is the *only* comparable reported case addressing the question presented in this litigation. In the *GTE Sprint* case, Wisconsin's statutory scheme imposed the state's general Sales Tax upon "access fees" charged by LECs to IXCs, but *not* upon charges for the same "access fees" made by the LECs to "resellers" or other LECs. The practical effect of this statutory scheme was to grant a competitive advantage to the "resellers" over the IXCs, solely because of the Sales Tax expense. Exactly the opposite competitive situation results in this case.

In the *GTE Sprint* decision, the Wisconsin Supreme Court considered and applied all of the proper presumptions mandated by this Court's decisions in *Madden, supra; Allied Stores of Ohio, supra;* and *Allegheny Pittsburgh Coal Co., supra;* but that court also recognized and applied the "objective" standards set forth by this Court's *Walters v. City of St. Louis, supra,* decision. In applying these standards to the three purposes offered by the state revenue department to justify the discriminatory imposition of the state's general Sales Tax, the Wisconsin Supreme Court found that there was nothing unique about the sale of access services to IXCs, resellers and other LECs; that all such businesses should be considered to be in the same class for purposes of this Equal Protection Clause challenge; and that the classifications created by the challenged Sales Tax statute were totally arbitrary and violated the Equal Protection rights guaranteed to GTE Sprint. The remedy ordered by the Wisconsin Supreme Court was a refund and abatement of any further Sales Taxes against GTE Sprint and the other IXCs. [8]

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[8] The Petitioners believe that it is extremely important for this Court to note that U.S. Sprint (previously GTE Sprint) strenuously argued inconsistent positions on the application of the Equal Protection Clause before the Wisconsin and Arkansas Supreme Court. In Wisconsin, U.S. Sprint was placed at a competitive disadvantage and its economic interests were adversely affected; but, in Arkansas,

Similarly, the Petitioners submit that the decision of an Illinois intermediate appellate court in the case of *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988) is also in direct conflict with the Equal Protection analysis of the Arkansas Supreme Court in this case. In the *Satellink* case, the operator of a SMATV subscription television service was found to have had its Equal Protection rights violated by the provisions of Chicago's 4% gross receipts based amusement tax ordinance that imposed this tax upon charges made for the delivery of television programming services by the SMATV operator, but specifically excluded from the tax base charges made by cable television operators in providing the same television programming. The Illinois appellate court also conducted a detailed Equal Protection analysis, considered and applied all of the presumptions of statutory validity and burden of proof required by this Court's decisions, but, like the Wisconsin Supreme Court in the *GTE Sprint* case, the Illinois court also noted and applied the "objective" standards set out in this Court in its *Royster Guano Co.* case, *supra*. The Illinois court found that there was no significant difference in the television programming service offered by the SMATV operator and the cable operator, and that the classification created by the City of Chicago's ordinance had no rational basis and, therefore, violated the SMATV's Equal Protection rights. The Illinois court made it clear that its decision was being made under the provisions of the Equal Protection Clause of the Fourteenth Amendment, not under the "free press" and "free speech" clauses of the First Amendment. [9]

U.S. Sprint (and the other "facility based" IXCs (e.g. AT&T and MCI)) have achieved a competitive pricing advantage over the "resellers" and are entitled to retain 2% of the total Sales Taxes collected on MTS interstate service (Ark. Code Ann. § 26-52-503). These inconsistent briefing position taken by this IXC were pointed out to the Arkansas Supreme Court by Petitioners' Motion Requesting Judicial Notice. (Arkansas Supreme Court Order of April 15, 1991 (App. D, *infra*, 17a))

[9] The Petitioners submit that the supreme courts of a number of Arkansas' sister states have also recently rendered decisions holding various of their respective states' taxes to have violated Equal Protection Clause standards, where those courts have also applied "objective" standards to make sure that all

Therefore, the Petitioners submit that there is a clear conflict between the decision by the Arkansas Supreme Court here and the decisions by the appellate courts of Arkansas' sister states in the application of Equal Protection standards where taxpayers are challenging taxes imposed upon services rendered in the ever evolving technological area of electronic communication. This Petition for Certiorari should be granted to set the exact standards that can be applied in instances involving communication services sold by these burgeoning electronic communication industries.

b. The issue presented here is important to all states in the administration of Sales Taxes on telephone and other electronic communication services.

Within the last twenty years, there has been a virtual explosion in new methods and means of electronic communication, both in the telecommunication and broadcast industries. These include satellite and cable television transmissions of television services, and the wireless transmission of telephone services by satellite and cellular means. These new types of electronic communication services have generated whole new industries, and charges are made for many new classifications of these services that did not even exist twenty years ago. Many state and local governments, in their search for new revenues, are beginning to apply both general and special excise taxes upon some or all of these new communications services. There has been no decision rendered by this Court, to date, involving an Equal Protection challenge to the statutory schemes for imposing general or special taxes upon these new communications services.

As with the discriminatory taxation of cable and satellite television subscription services in the *Medlock* case (where the same television programming was provided to the subscribers to both services in virtually the same manner), the discriminatory

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taxpayers within the same class were treated equally. See, *Northern Natural Gas Co. v. Board of Equalization and Assessment*, 443 N.W.2d 249 (Neb., 1989); *Amex Magnesium Corp. v. State Tax Commission*, 496 P.2d 1256 (Utah, 1990); and *Associated Grocers, Inc. v. State*, 787 P.2d 22 (Wash., 1990), *cert. denied*, *Washington v. Associated Grocers, Inc.*, 111 S. Ct. 670 (1991).

taxation of long distance interstate telephone services that are provided over exactly the same equipment, transmitting the same voice, data and image messages, causes the same Equal Protection question to be raised here when Arkansas taxes MTS interstate telephone services, while the same WATS interstate telephone services are excluded from the Sales Tax base.

This Court should note that the very same statutory scheme for taxing MTS and WATS interstate telephone services differentially has recently been adopted in the states of Minnesota and Tennessee. [10] Likewise, some states have now begun to adopt statutes that impose their general Sales Taxes upon charges for "premium" and "pay per view" cable television services, but not upon charges for "basic" cable services. [11]

This Court recently addressed a Commerce Clause question in a challenge to a state tax imposed upon charges for interstate telephone services in *Goldberg v. Sweet*, 488 U.S. 252 (1989), but an Equal Protection Clause issue was not involved. The Petitioners submit that there is great need for guidance to subscribers to these electronic services, to the providers of such electronic services, and to state legislatures and revenue departments, as to where proper classifications can legitimately be made for Equal Protection purposes, in the taxing of services in this new and complex area of technology.

Writing for the majority, in *Williams v. Vermont, supra,* 472 U.S. at 28, Justice White noted that: "The 'dominant theme running through all state taxation cases is the concern with the actuality of operation." See also, *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, at 69 (1963). In *Halliburton*, this Court also

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[10] See, Tenn. Code Ann. § 67-6-102(27) and § 67-7-221, effective June 1, 1989; and Minn. Code Ann. § 297A.25, effective May 31, 1987.

[11] See, for example, Tenn. Code Ann. § 67-6-212, effective May 31, 1987, and Act 22 of 1991, § 43, Pennsylvania General Assembly, effective October 1, 1991.

specifically noted that "equality for purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." 373 U.S. at 70. Wisconsin's Supreme Court, in its *GTE Sprint* case, *supra*, specifically noted that the statutory scheme that imposed Sales Taxes upon an IXC's purchase of access services from an LEC, while not imposing the tax upon the same purchase by resellers or other LECs, resulted in GTE Sprint and all other IXCs being placed at an unfair competitive disadvantage, solely because of the classification made by the Sales Tax statute. The Petitioners here, as subscribers to MTS interstate services, allege that the same situation results from the classification of interstate services made by § 2 of Act 27 of 1987, and that this Court should "level the playing field" by declaring the classification between MTS interstate service and WATS interstate service to be palpably arbitrary, invidious, capricious, feigned and illusory. [12]

c. The Arkansas Supreme Court's decision fails to apply any objective Equal Protection standards mandated by this Court's prior decisions.

In the last decade, the Arkansas Supreme Court has decided three cases involving challenges to state or local taxes based upon the Equal Protection Clause, [13] and that court has denied all of the taxpayers' challenges. In each of these cases, the Arkansas Supreme Court has emphasized it has the duty, under this Court's decision in *Carmichael v. Southern Coal Co., supra,* to "hypothesize" any legitimate basis that the Arkansas General Assembly "could have considered" in making the discriminatory classification

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[12] See the comments of Senator Jon Fitch regarding this competition issue, in the floor debate over S.B. 196 while it was before the Arkansas Senate on January 29, 1987, where he referred to this classification as "horrible." (See, Exhibit B, Petitioners' Motion to Disqualify All Specially Appointed Justices filed on March 29, 1991).

[13] See, *Streight v. Ragland*, 655 S.W.2d 459 (Ark., 1983); *City of Little Rock v. Waters*, 797 S.W.2d 426 (Ark., 1990); and the instant *Bosworth* case.

in its various taxing statutes (810 S.W.2d at 923). The Petitioners respectfully submit that this "hypothesizing" standard adopted by the Arkansas Supreme Court has led it to totally ignore the "objective standards" required in Equal Protection challenge by this Court's prior *Allied Stores of Ohio, supra; Walters v. City of St. Louis, supra;* and *Royster Guano Co., supra; decisions* resulting in this "hypothesizing" activity becoming a "subjective" standard where the challenging taxpayer can never hope to succeed on his burden of proof in an Equal Protection challenge. The taxpayer must not only negate the "purposes" proffered by the state itself, but he must also anticipate any purposes that can be "hypothesized" by the Arkansas court.

Further, the Petitioners submit that an examination of the limited (one page) discussion of the rational basis standards in the Arkansas Supreme Court's decision (810 S.W.2d at 922-923) reflects that that court has failed to properly apply the "two part" rational basis test. Instead, that court has merged both parts into one. The Arkansas court never clearly delineated in its opinion what legitimate "state purpose" was created by the classification in § 2 of Act 27 of 1987. However, it is clear that the second part of the rational basis test was not applied to see if the classification drawn by this statute was "reasonably" or "rationally" related to the state's purpose. The Arkansas court concluded (810 S.W.2d at 923) --

> Once we have reached the conclusion, as we have in this case, that a legitimate governmental purpose could be served by the legislation, and even though we do not know with certainty the actual underlying reasons for the law's enactment, we must bring our analysis to a close.

From a review of the Arkansas Supreme Court's limited analysis of the rational basis test in this case, it appears that that court may have found that the state's purpose for the classification in § 2 of Act 27 of 1987 was to provide a tax incentive to commerce as a means to encourage businesses to stay and locate in this state. (810 S.W.2d at 923) Though the Petitioners acknowledge that the encouragement of business by the creation of tax incen-

tives is a legitimate state purpose for Equal Protection purposes, they steadfastly maintain that the MTS versus WATS classification drawn by § 2 of Act 27 of 1987 is *not* reasonably or rationally related to the purpose of encouraging business. The evidentiary record in this case establishes that there is absolutely no restriction upon either residential or business users subscribing to WATS interstate services. It is also undisputed that the normal telephone regulatory rate structure is generally divided into differential rates for (1) residential subscribers and (2) business subscribers. Thus, if the Arkansas General Assembly had wanted to provide an economic incentive to encourage businesses to stay and locate in this state, it could have drawn the classification by subjecting all *residential* interstate services to the Sales Tax, while excluding or excepting all *business* interstate services from the tax. However, the classification of whether to tax or not to tax interstate telephone services, based solely upon the regulatory rate structure for MTS interstate service, and WATS interstate service, does *not* further the objective of providing tax incentives to encourage businesses to stay or locate in Arkansas, because not *all* businesses are treated or taxed the same. Henningsens, Inc., the small corporate business that is a representative Petitioner herein, and all similarly situated *business* subscribers clearly did not receive any benefit from the classification drawn by § 2 of Act 27 of 1987. The Petitioners submit that all other businesses (no matter of what type or size or the volume of their sales or number of employees), if they have a low volume need for interstate long distance services, they will *not* be treated the same as businesses who are able to economically afford to place their interstate calls through the utilization of untaxed WATS services.

For purposes of testing the constitutionality of the classification created in this case, the Petitioners submit that "telephone service is telephone service is telephone service." Exactly the same transmission equipment is utilized; the same data voice and image messages are transmitted; and the rate structure of both MTS and WATS services are time of day, day of week, length of time utilized, and distance sensitive (with the WATS rates having a lower rate, which amounts to a "volume discount"). The Petitioners submit that the challenged statute's classification based solely upon a utility regulatory rate structure is as irrational,

capricious, palpably arbitrary, and illusory as this Court found the classifications of taxpayers to be in *Zoebel v. Williams*, *supra*, and *Stewart Dry Goods, supra*. This Court has held in *Williams v. Vermont*, 472 U.S. at 27 that "the classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." The Petitioners submit that the WATS versus MTS interstate service classification drawn by § 2 of Act 27 of 1987 is such a "bootstrap" classification, it is not a *real* distinction; and that it does not come within the lack of mathematical precision exception allowed legislatures in creating classifications of taxpayers.

Accordingly, the Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, and also accept the trial judge's invitation (App. J, *infra*, at 53a) for this Court to reverse her decision upholding the Sales Tax in this case, because a utility regulatory rate structure alone (especially in the circumstances where it creates a competitive pricing advantage for the large "facility based" IXCs) is not a sufficient basis upon which to justify a classification of taxpayers under a proper application of the rational basis test for Equal Protection purposes.

II. THE REFUSAL OF THE SPECIAL ASSOCIATE JUSTICES TO RECUSE, UPON THE REQUEST OF THE PETITIONERS MADE PRIOR TO THE SUBMISSION OF THE CASE, VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND SUCH DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

This Court recently ruled in *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, at 2251 (1990) that, in challenges to state taxes, the Due Process Clause of the Fourteenth Amendment requires that the taxpayer be provided with "a fair opportunity to challenge the accuracy and legal validity of their tax obligation [and] ... a "clear and certain remedy" ... for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."

(Citations omitted) It is the "fair opportunity to challenge" issue that is raised by the Petitioners' Due Process claims in this case. Only a decision of this Court, under its general supervisory powers over the states' courts, can grant the Petitioners their Due Process rights here, since there is no other appeal from a refusal by a majority of a state appellate court to recuse at the request of one of the litigants.

This appeal presents an elemental Due Process question that should be held to be well within the limits of Due Process protection under the Fourteenth Amendment. Here, the factual record (upon which the Due Process issue was raised) establishes that: (1) the challenged tax Act was an "administration bill" promulgated by Governor Clinton's administration; (2) the constitutionality of this Act has been defended by a political appointee within Governor Clinton's Executive Department; and (3) the Executive Department stands to lose $5.0 million per year in "new" Sales Tax collections if this case is lost. Thus, Governor Clinton, as the head of Arkansas' Executive Department, is, at the very least, a *de facto* party litigant in this case.

When a majority of the "elected" justices of the Arkansas Supreme Court recused, and rejected the Petitioners' written request for an opportunity to remit (pursuant to the provisions of Canon 3D of the Arkansas Code of Judicial Conduct (App. I, *infra*, 45a), then the appointment provisions of Art. 7, § 9 of the Arkansas Constitution were brought into play, when the Chief Justice of the Court requested Governor Clinton to appoint four special justices to serve in this case. Upon appointment of these special justices, it was ascertained by Petitioners that two of the special "appointed" justices' close family members had recently made substantial political contributions to Governor Clinton (which activity is prohibited by Canon 7A of the Code of Judicial Conduct); that another "appointed" justice had, within the year, been appointed by Governor Clinton in another taxpayer "illegal exaction" case where he had authored the opinion against the taxpayer–class, reversing the trial court's decision; and both Governor Clinton and the Chairman of the ABA Judicial Nominations Committee refused to disclose the standards utilized or contacts made with any lawyers in choosing such special justices.

Based upon these facts, plus the fact that Governor Clinton had unbridled discretion in making his appointments to create a "majority" of the Court that would pass upon the constitutionality of § 2 of Act 27 of 1987, the Petitioners formally filed a Motion Requesting the Recusal and Disqualification of the four special "appointed" associate justices, and suggesting at least four separate methods that could be adopted by either the officials of the Executive or Judicial Departments of Arkansas' state government (as an alternative to Governor Clinton's participating in these appointments), to avoid this constitutional crisis or conflict. This timely objection formally raised the denial of Due Process question, and specifically alleged that this situation (1) raised the appearance of judicial impropriety, (2) questioned the independence of the judiciary, and (3) reasonably raised the question of impartiality; all of which are *requirements* for recusal under the Code of Judicial Conduct. [14]

In the treatise, *Judicial Conduct and Ethics* (The Michie Company, 1990), Professors Shaman, Lubet, and Alfini specifically commented upon this type of situation by stating (p. 100):

> Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest and decide the lawsuits before them in a just and proper way. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge than he or she may realize, with the result that the judge has little conscious knowledge of being swayed by improper influences. Further-

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[14] Under the terms of the Code of Judicial Conduct, Canon 1 requires that the judiciary be independent; Canon 2 requires that judges avoid impropriety or even the appearance of impropriety; Canon 3 provides the general rule that a judge should disqualify in any proceeding where his impartiality might reasonably be questioned (an "objective" standard), or the question of impartiality or bias of a judge is raised; Canon 7 prohibits a judge from making political contributions to a candidate; and the compliance provisions (Addendum) state that these requirements of the Code of Judicial Conduct apply to judges *pro tempore*, as well as full time judges.

> more, even if a judge were able to put aside bias and self-interest in a particular case, *the appearance of impropriety remains, and is itself a serious problem that can cast disrepute upon the judiciary*. (Emphasis supplied)

The situation confronting the Petitioners in this case in March of 1991 (because of the recusal of the majority of the "elected" members of the Arkansas Supreme Court) was the same that would have existed if Franklin D. Roosevelt would have had the unbridled discretion and power to appoint the "majority" of this Court to pass upon the constitutionality of his "New Deal" legislation in the 1930's. Since Act 27 of 1987 was undeniably an "administration bill," Governor Clinton simply cannot participate in the appointment process of special justices to participate in this case without raising the *appearance of impropriety*, which situation would disqualify anyone Governor Clinton would appoint.

Though there are four specific factual situations set forth in Canon 3C of the Code of Judicial Conduct, under which judicial officers should recuse and disqualify, the drafters of the Code made it clear that the general rule still had overall control. [15] Under the circumstances of this case, it is inescapable that any *objective* party would find that Governor Clinton's appointed justices' "impartiality" could reasonably be questioned. [16]

This Court has previously rendered decisions in both civil and criminal cases involving Due Process disqualifications of a

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[15] The reporter of the ABA Committee that promulgated the Code of Judicial Conduct, in commenting on Canon 3C, specifically noted that even "the appearance of impropriety in violation of Canon 2...clearly falls within the scope of the general standard." Thode, *Reporters' Notes to Code of Judicial Conduct, American Bar Foundation (1973)*.

[16] Since there are several procedural methods available under state law for the appointment of the four special associate justices in this case, without Governor Clinton being involved, the exception to Canon 3C that applies under the "rule of necessity" is not applicable here. *United States v. Will*, 449 U.S. 200 (1980).

single judge, an entire panel, and a single justice in a multimember panel where that justice provided the swing vote for the majority. [17] The factual situation presented here, where a "majority" of a multimember panel of justices should be disqualified, has never been passed upon by this Court. However, the Petitioners submit that such factual situation is closely analogous to the one that was presented in the *Aetna Life* case, *supra*.

The denial of Due Process rights in a factual instance such as the one presented here is a denial that cannot be defined with precision, but, instead, must be decided on a case by case basis. As this Court succinctly stated in *Matthews v. Eldredge*, 424 U.S. 319, at 334 (1976):

> [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance....Due process is flexible and calls for such procedural projections as the particular situation demands. (Citations omitted)

This Court has accepted and applied this *ad hoc* rule in a case involving a tax challenge, [18] as well as in cases involving requests for judicial recusal. [19]

As Justice Black stated in *In re Murchison*, nearly forty years ago (349 U.S. at 136), the application of "Such a stringent rule may sometimes bar trial by judges who have no actual bias

---

[17] *Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973); and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

[18] See, *Davidson v. Court of Administrators of New Orleans*, 96 U.S. 97, 101–102 (1878).

[19] See, *Aetna Life Insurance Company, supra*, 475 U.S. at 822; *Ward, supra*, 409 U.S. at 60; and *In re Murchison, supra*, 349 U.S. at 136.

and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Offitt v. United States*, 348 U.S. 11, 14.

Accordingly, the Petitioners submit that their timely request for disqualification and recusal of the special "appointed" associate justices of the Arkansas Supreme Court, under the factual circumstances presented in this case, properly raised the *objective* claim that their rights to Due Process under the Fourteenth Amendment were being denied. The Arkansas Supreme Court's denial of this request for disqualification, and the authoring of that court's opinion in this case by one of these special "appointed" associate justices (joined by all three of the other special "appointed" justices, a *majority* of the Court), presents a situation where the Petitioners were constitutionally denied their rights to Due Process. Only the granting of this petition and the Court's reversal of the Arkansas Supreme Court's decision, in line with standards set by this Court in its prior decisions, can right the Petitioners' loss of their constitutional rights to enjoy the Due Process of the laws.

CONCLUSION

For the particular reasons stated above, the Petitioners submit that this Petition for Certiorari to the Arkansas Supreme Court should be granted, so as to provide this Court with a vehicle to answer the important Equal Protection and Due Process questions of the Fourteenth Amendment that are presented by the Petitioners.

Respectfully submitted,

SEPTEMBER 27, 1991

EUGENE G. SAYRE
JACK, LYON & JONES, P.A.
425 West Capitol Ave.
3400 TCBY Tower
Little Rock, AR 72201
(501) 375-1122
Counsel of Record
For Petitioners

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APPENDIX A

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201
July 1, 1991

Eugene G. Sayre
Attorney at Law
425 W. Capitol Ave.
3400 TCBY Tower
Little Rock, AR 72201-3472

Re: 89-345 Hugh H. Bosworth, et. al.
v. James C. Pledger et. al.

Dear Mr. Sayre:

The Supreme Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

LESLIE W. STEEN, CLERK

LWS:rh

cc: Joyce Kinkead
Larry D. Vaught
Frank J. Wills, III
Carol S. Arnold
James N. McCord
(#88-928)
Michael O'Malley
Gregory Hopkins
Charles Schlumberger
Lawrence E. Chisenhall
Alice Holcomb, Clerk

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 89-345

Opinion delivered: June 3, 1991

HUGH H. BOSWORTH, JR., ET. AL.,

Appellants

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES, ET. AL.

Appellees

CITY OF FAYETTEVILLE, ARKANSAS, ARKANSAS TELEPHONE ASSOCIATION, INC.

Intervenors

Appeal from Pulaski County Chancery Court, No. 88-928,

Honorable Ellen B. Brantley, Judge

Affirmed

SPECIAL JUSTICE, GEORGIA ELROD

This case involves the constitutionality of the 1987 Arkansas legislative enactment which extended the state sales tax to certain types of long distance telecommunications service while excepting others. In this class action challenge, the appellants, who are telephone subscribers upon whose telephone service the tax was imposed, argued that the tax was unconstitutional, on both

First Amendment and Equal Protection Clause grounds. Appellees represented the state and local governmental agencies responsible for collecting the disputed tax as well as those providers of the long distance service involved, e.g., AT&T Communications, Inc., MCI Telecommunications Corporation, and U.S. Sprint Communications Company. The chancellor held that the law was a valid and legitimate exercise of the state's power to tax and upheld its constitutionality. We affirm.

Prior to the enactment of Section 2 of Act 27 of 1987 [Ark. Code Ann. § 26-52-301(3) (Supp. 1989)], the Arkansas Gross Receipts Tax, or sales tax, was imposed only on *intra*state long distance service. Interstate and international service were not subjected to the tax. In 1987 the law was changed, and the tax was imposed on all long distance telephone service billed to an Arkansas telephone number, excepting from the tax, however, two types of service: (1) private line service which is not accessible by the public, and (2) that service commonly known as WATS service. The relevant portions of section 26-52-301 provide as follows:

> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> . . .
>
> (3)(A)(i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.
>
> (ii) Taxable services shall include basic local service and rental charges, including all

installation and construction charges and all service and rental charges having any connection with transmission of any message or image.

(iii) Except as provided in subdivision (3)(iv) of this section, taxable long distance services shall include:

(a) Long distance messages which originate and terminate within this state:

(b) Interstate long distance messages which originate within this state and terminate outside this state and are billed to an Arkansas telephone number or customer location;

(c) Interstate long distance messages which originate outside of this state and terminate within this state and are billed to an Arkansas telephone number or customer location.

(iv) However, the following services shall not be subject to the tax:

(a) Any interstate private communications service which is not accessible by the public;

(b) Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

(c) Any interstate-wide area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from

> persons having telecommunications service in a specified area which is outside the state in which the station provided with this service is located.
>
> (v) This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. However, access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

Appellants do not challenge the exception for private line service, contending only that the tax was improperly imposed on, and thus discriminated against, Arkansas subscribers to long distance telephone service not of the WATS variety.

Although the record below contains much evidence on the complex aspects of telecommunications technology and rate structure, the chancellor found that the differences between the two types of service, one taxed and the other not, could be described as follows:

(1) "Regular" long distance service (sometimes called MTS service) is billed on a per call basis with the charge for each call generally depending on the day of the week and the time of the day at which the call is made, the geographic distance of the call, and the temporal length of the call. This is the most common type of long distance service and is usually subscribed to by those who may, in addition, use WATS service. This service is subjected to the sales tax.

(2) Wide-area telecommunications service, commonly known as WATS, is where the subscriber is charged a

flat fee for the service, receiving then a lower rate for each call made or received. This category is broken down between incoming WATS, or "800 service," and outgoing WATS. This service is not subjected to the tax.

The chancellor also found that "[t]he main difference between WATS and MTS is in rate design," and that both services are available to any customer, with no eligibility requirements. Appellants, plaintiffs below, all subscribe to "regular" long distance service and none to WATS service. All parties generally agreed that a customer must have a high volume of telephone usage in order to justify economically the use of WATS.

Appellants' constitutional challenge to Section 2 of Act 27 of 1987 is based upon the state's purported violation of the equal protection provisions of both the Arkansas [1] and U.S. [2] Constitutions. Their argument, made in the trial court, that the statute violated the Commerce Clause of the U.S. Constitution, was definitively decided against them during the course of this litigation by the U.S. Supreme Court in *Goldberg v. Sweet*, ___ U.S. ___, 109 S. Ct. 582 (1989) and was not argued on appeal. Appellants' argument that their due process rights under the U.S. and Arkansas Constitutions were violated because the statute was unclear, or void for vagueness, was not properly presented at the trial court level, nor addressed by the chancellor in her findings of fact and conclusions of law. Likewise, the chancellor did not address appellants' point, argued on appeal, that the statute was ambiguous. Thus, neither of these latter issues will be addressed by this court. *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990).

---

[1] Ark. Const. art. 2, § § 3 and 18.

[2] U.S. Const. amend. 14.

We are called upon to answer three questions in resolving the constitutional issues presented by this case: (1) Does the imposition of the tax discriminate against or among individuals? (2) If so, what standard is to be applied in testing the legitimacy of the law, a "rational basis" standard or one which requires the showing of a compelling state interest? (3) And, finally, does the statute meet the requisite standard? These questions will be addressed in turn.

I.

In deciding whether an equal protection challenge is warranted, there must first be a determination that there is a state action which differentiates among individuals. "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14. Appellees argue that the threshold element of classification of individuals is not met because the only distinction made by the statute is between services, not people. Appellees cite *Potts v. McCastlain*, 240 Ark. 654, 401 S.W.2d 220 (1966), *cert. denied*, 358 U.S. 946 (1967), where this court upheld a privilege tax imposed on taxicabs but not on other vehicles using the same streets. They argue that as long as all "regular" long distance subscribers are taxed the same, just as all taxicab operators were taxed the same, there is no differentiation among individuals, all being treated equal. In addition, appellees cite the chancellor's finding that "all three types of service -- MTS, private line, and WATS -- are available to any customer; there are no eligibility requirements," to bolster their argument that this is a tax imposed on services, not individuals.

Although it is true that the tax is imposed on one type of long distance service and not another, it is also true that taxes are paid by individuals, and the record reflects that subscribers to "regular" long distance service pay the tax, while subscribers to WATS service do not. This disparate treatment under the statute of classes of individuals is sufficient to raise the equal protection challenge and require our further analysis.

II

Once equal protection is invoked, we must then decide what standard of analysis applies. In other words, we must determine whether it is necessary only to show some rational basis for the classification, or whether the statute impinges on a fundamental right or is based on a suspect criterion, in which case the state is required to prove not only that the statute is reasonable but also that it promotes a compelling state interest. Appellants argue for the application of the stricter standard because their constitutional rights of free speech are imperiled; appellees contend reasonableness alone is required.

The U.S. Supreme Court recognized the broad discretion legislatures have in formulating tax policy in *Madden v. Kentucky*, 309 U.S. 83, 87–88 (1940):

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized ... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

In *Streight v. Ragland*, 380 Ark. 206, 655 S.W.2d 459 (1983), this court considered an equal protection challenge to a state income tax law which provided an exemption on retirement income from certain government sources but denied the exemption to private retirement income. In upholding the exemptions as valid exercises of the state's taxation powers, we stated:

> The rational basis test has long been applied by the Supreme Court in reviewing state legislation under the equal protection clause of the 14th Amendment which imposed special burdens or granted exemptions from such burdens through classification schemes ...
>
> Under the rationality standard of review, we must presume the legislation is constitutional, i.e. that it is rationally related to achieving a legitimate governmental objective.

Id. at 212–13, 655 S.W.2d at 463.

While acknowledging the applicability of the rational basis analysis to a state's taxation powers, appellants argue that in this case the court should apply a higher standard because their First Amendment protections under the U.S. Constitution have been abridged. Appellants assert that they have a "fundamental right" to exercise "free speech" by transmissions over the telephone, and because these rights are implicated in the tax-based classification between long distance subscribers, the state must show that it has a compelling state interest to justify the infringement. In support, appellants cite *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenues*, 460 U.S. 575 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 287 Ark. 155, 697 S.W.2d 94 (1985), *reh'g denied*, 287 Ark. 155, 698 S.W.2d 802 (1985), rev'd, 481 U.S. 221 (1987); and *Medlock v. Pledger*, 301 Ark. 483, 785 S.W.2d 202 (1990), *rev'd sub nom. Medlock v. Leathers*, ___ U.S.

___, 111 S. Ct. 1438 (1991).

Minneapolis Star, supra, involved a special use tax on the cost of paper and ink consumed in the production of publications, exempting the first $100,000 used, with the result that only a few of the largest publishers were taxed. The Court invalidated the tax, citing First Amendment infringement with no compelling state interest to redeem it. *Arkansas Writers' Project, supra*, invalidated an Arkansas law which taxed general interest magazines but exempted from the sale tax, sales of religious, professional, trade and sports magazines.

Both *Minneapolis Star* and *Arkansas Writers' Project* are distinguishable from the present case, as both of those cases involved a form of censorship of the speaker, i.e., the largest newspapers, and in *Arkansas Writers' Project* there was censorship of the content, i.e., that contained in general interest magazines. In the present case there is no attempt to censor based on content or to discriminate among classes of speakers. Act 27 imposes a tax on every use of the types of long distance services that are subject to the tax, regardless of the purpose for which the customer uses the service, what the customer says while using the service, or the identity of the service provider.

The case most closely on point, and to this court determinative of the First Amendment question, is *Medlock, supra,* where the constitutional validity of a sales tax on cable television service was challenged. The tax was levied on cable television service, but not on similar services, such as satellite television programming. Although this court determined the tax unconstitutional because of First Amendment infringement, the U.S. Supreme Court saw otherwise and held that the law in question did not threaten to suppress the expression of particular ideas or viewpoints, nor did it target a small group of speakers or discriminate on the basis of the content of taxpayers' speech. None of these three elements being present, the tax was not constitutionally

vulnerable on First Amendment grounds.

> The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

Medlock v. Leathers, ___ U.S. at ___, 111 S. Ct. at 1447.

We therefore hold that Act 27 of 1987 does not violate appellants' First Amendment rights, and the stricter standard of review is inapplicable. The appropriate analysis, therefore, is whether there exists for the classification any rational basis which provides a "deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose." *Streight v. Ragland*, 280 Ark. 206, 215, 655 S.W.2d 459, 464 (1983).

III

The burden is upon appellants to demonstrate the lack of rational basis for the tax. *Streight, supra*. The legislature has the discretion, within reasonable limits, to determine the scope of the exercise of its taxing power, and there is a presumption in favor of the validity of its action. *Potts v. McCastlain*, 240 Ark. 654, 401 S.W.2d 220 (1966), *cert. denied*, 358 U.S. 946 (1967).

A state has wide latitude in the exercise of its power of taxation. The power to tax necessarily implies the power to discriminate in taxation. The law does not dictate that taxing measures be applied to all members of a class or none. Distinctions are permissible, and if there is any conceivable set of facts to uphold the law's rational basis, it will be upheld. *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *Dicks v. Naff*, 355 Ark. 357, 500 S.W.2d 350 (1973).

In determining whether a rational basis for the legislation exists, we are not required to discover the *actual* basis for its enactment, but rather we are allowed to hypothesize the facts giving rise to the classification.

Testimony in the trial court indicated that WATS or WATS-like service tended to be used by large volume consumers of telephone service. It is not economically feasible to purchase WATS service unless the consumer has a large volume of long distance telephone usage; thus the WATS customer is more likely to be a business subscriber than to be an individual residential subscriber.

The State of Arkansas has a long history of providing tax incentives to commerce as a means to encourage businesses to stay and locate in this state, and, certainly, economic development is a legitimate and worthy governmental goal. For example, the "enterprise zone" legislation gives a tax advantage to industries that locate in economically depressed areas, Ark. Code Ann. § 15-4-807 (Supp. 1989), and the motion picture industry is accorded tax incentives in order to encourage film making in this state. Ark. Code Ann. § 26-4-206 (1987), and § 26-52-402(c)(3) (1987).

The legislature may have intended, in the enactment of Section 2 of Act 27 of 1987, to encourage large volume users of telephone service, i.e., WATS subscribers, to remain or relocate in Arkansas. We agree with the chancellor's finding that this basis

for the legislation would be rationally related to achieving a legitimate governmental objective.

It is not the job of this court to evaluate the wisdom of our legislature in enacting tax measures, which inevitably will fall more heavily on some than on others. Our task is to protect against classifications which are arbitrary and without reason. As the United States Supreme Court stated in *City of New Orleans v. Dukes*, 427 U.S. 297, 303–304 (1976):

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude .... [T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, ... in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Once we have reached the conclusion, as we have in this case, that a legitimate governmental purpose could be served by the legislation, and even though we do not know with certainty the actual underlying reasons for the law's enactment, we must bring our analysis to a close. We therefore confirm the constitutionality of the law and affirm the chancellor's decision.

Affirmed.

Special Justices John R. Byrd, James H. Pilkinton, Jr., and David M. Glover join in this opinion.

Dudley, Hays, Newbern, and Glaze, JJ., not participating.

APPENDIX C

Office of the Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201
December 10, 1990

Eugene G. Sayre
Attorney at Law
425 W. Capitol Avenue
3400 TCBY Tower
Little Rock, AR 72201

Re: 89-345 Hugh H. Bosworth, et al.
v. James C. Pledger et al.

Dear Mr. Sayre:

The Supreme Court made the following order in the above styled case today:

"Appellants' motion for reconsideration of recusal or disqualification of justices is denied."

Sincerely,

LWS:rh

LESLIE W. STEEN, CLERK

cc: Amy Stewart
Carol S. Arnold
Joseph Morphew
Lawrence R. Chisenhall
James N. McCord
Scotty Shively
W.W. Elrod, II
Frank J. Wills III
Rick L. Pruett
Gregory Hopkins
Pat Moran
N. M. Norton
Larry D. Vaught

APPENDIX D

Office of the Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

April 15, 1991

Eugene G. Sayre
Attorney at Law
425 W. Capitol Avenue
3400 TCBY Tower
Little Rock, AR 72201

Re: 89-345 Hugh H. Bosworth, et al.
v. James C. Pledger et al.

Dear Mr. Sayre:

The Supreme Court made the following orders in the above styled case today:

> "Appellants' motion and affidavit requesting this court to take judicial notice of the filing of briefs by U.S. Sprint Communications with the Supreme Court of Wisconsin is denied. Appellants' motion suggesting disqualification of all appointed "special" associates justices, for reconsideration of recusal or disqualification by elected justices, or,

alternatively, for other relief is denied. Dudley, Hays, Newbern, and Glaze, JJ., not participating."

Sincerely,

LESLIE W. STEEN, CLERK

LWS:rh

cc: Larry D. Vaught
N.M. Norton, Jr.
Amy Stewart
Carol S. Arnold
Pat Moran
Craig Smith
Rick L. Pruett
James M. McCord

APPENDIX E

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

HUGH H. BOSWORTH, JR., ET. AL.

v. NO. 88-928

JAMES C. PLEDGER, Commissioner of Revenues; ET AL.

(Filed May 19, 1989)

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

This action was commenced by plaintiffs as a class action on March 3, 1988, challenging the constitutionality of Act 27 of 1987, codified at Ark. Code Ann. § 26-52-301(3)(A), which imposes the Arkansas Gross Receipts Tax (hereinafter, "the Sales Tax") on telephone, telegraph telecommunication services. The statute states as follows:

> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> * * *
>
> (3)(A)(i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.

(ii) Taxable services shall include basic local service and rental charges, including all installation and construction charges and all service and rental charges having any connection with transmission of any message or image.

(iii) Except as provided in subdivision (3)(iv) of this section, taxable long distance services shall include:

(a) Long distance messages which originate and terminate within this state;

(b) Interstate long distance messages which originate within this state and terminate outside this state and are billed to an Arkansas telephone number or customer location;

(c) Interstate long distance messages which originate outside of this state and terminate within this state and are billed to an Arkansas telephone number or customer location.

(iv) However, the following services shall not be subject to the tax:

(a) Any interstate private communications service which is not accessible by the public;

(b) Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

> (c) Any interstate wide-area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunication service in a specified area which is outside the state in which the station provided with this service is located.
>
> (v) This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. However, access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

Plaintiffs' challenge focuses on the provisions of Act 27 governing imposition of the tax on interstate long-distance services (Ark. Code Ann. § 26-52-301(3)(A)(iii)(b) through (3)(A)(v)). In this regard, they challenge Act 27 primarily on two grounds. First, they contend that the Act violates the equal protection clauses of the state and federal constitutions [1] due to the statute's exemption from taxation of certain types of interstate long-distance telecommunications. Second, they argue that the imposition of the Sales Tax on interstate long-distance telecommunications violates the commerce clause of the federal constitution. [2] The plaintiff class consists of those individuals and entities that subscribe to those types of interstate long-distance telecommunication services that are taxed.

---

1 Ark. Const., art. 2, sec. 3; U.S. Const. amend. 14.

2 U.S. Const. art. 1, sec. 8, cl. 3.

The defendants in this action fall into two categories. The first consists of the state and local governmental officials and entities that levy the Sales Tax ("the Taxing Authorities"). The second category consists of the providers of interstate long-distance services, here collectively referred to as the inter-exchange carriers ("IXCs"). The IXCs are the entities that are required by law to collect and remit the Sales Tax to the Taxing Authorities.

A trial and hearing on the merits of this action was held on December 13, 1988. Previously, there had been substantial briefing of the issues in this case, as well as hearings at which evidence was introduced. The following findings of fat and conclusions of law are based on the entire record in this case, including all evidence introduced throughout the course of these proceedings.

FINDINGS OF FACT

1. Act 27 of 1987, Ark. Code Ann. § 26-52-301(3)(A), was passed by the General Assembly of the State of Arkansas on February 9, 1987, and was approved by the Governor on February 11, 1987. As stated in its emergency clause, Act 27 became effective immediately upon passage and approval.

2. In the context of Act 27, interstate long-distance services are divided into three types. The first type is "regular" long-distance service, hereafter referred to as MTS. MTS is billed on a per-call basis, with the charge for each call generally depending on the day of the week and the time of day at which the call is made, the geographic distance of the call, the temporal length of the call. MTS is provided by all IXCs, and this is the type of long-distance service most commonly subscribed to by the IXCs' customers. All of the representative plaintiffs in this action subscribe to MTS.

3. The second type of interstate long-distance service is Private Line service. This type of service provides a direct, discrete line between or among points designated by the customer. Private Line Service is accessible only by the points that are part of the Private Line network, and Private Line service cannot be used to access other points outside the network. None of the plaintiff-representatives subscribe to Private Line service.

4. The third type of interstate long-distance service is wide-area telecommunications service, commonly known as WATS. This type of service may be provided over either dedicated or non-dedicated lines and contains two sub-categories: Incoming WATS, sometimes known as "800 service," and outgoing WATS. The main difference between WATS and MTS is in rate design. Instead of incurring charges on a per-call, per-minute basis, the WATS subscriber is charged a flat rate for the service. In effect, WATS is a "bulk" service. None of the plaintiff-representatives subscribe to WATS service.

5. Under Act 27, interstate long-distance telecommunications made through MTS service are subject to the Sales Tax, while interstate long-distance telecommunications made through Private Line and WATS services are not subject to the Sales Tax.

6. Generally, subscribers to Private Line or WATS service also are subscribers to MTS service.

7. All three types of services -- MTS, Private Line, and WATS -- are available to any customer; there are no eligibility requirements.

8. An "access" charge is a charge levied by the local telephone service providers (local exchange carriers or "LECs") at the originating and terminating points of a long-distance telecommunication. Generally, a long-distance telecommunication originates on the system of an LEC and then is "switched" from

the originating LEC's system to the IXC's system, which transmits the message to the locale of the terminating point. When the message reaches the terminating locale, it is then "switched" into the system of the LEC for that locale for final transmission to the terminating point. The access charge thus is the charge levied by the LECs for accessing their systems as part of the long-distance telecommunication.

CONCLUSIONS OF LAW

I. Equal Protection

9. To prevail on their claim that Act 27 violates the equal protection clauses of the state and federal constitutions, plaintiffs first must establish the threshold elements of such a claim: A state action that creates classes of individuals upon which disparate treatment is imposed. Then, plaintiffs must establish that the disparate treatment imposed by the state action is without rational basis; i.e., that the state action is not rationally related to a legitimate state purpose. *E.g., Streight v. Ragland*, 280 Ark. 206, 213, 655 S.W.2d 459, 463 (1983).

10. Plaintiffs' equal protection challenge fails, in the first instance, because the threshold elements are not present in this case. Unquestionably, Act 27 constitutes a state action. Act 27 also crates class differentiation in that some types of interstate long-distance services are taxed, while others are not. But the critical distinction here is that the class differentiation focuses upon types of *services*, not individuals. Every individual that subscribes to MTS is taxed for the use of that service. The fact that subscribers to Private Line and WATS services are not taxed has nothing to do with those individuals' identifies; rather, by the terms of Act 27 the distinguishing characteristic is the type of service provided. This critical distinction under equal protection analysis is established in both and federal and state law. In *Reeder v. Kansas City Board of Police Commissioners*, 796 F.2d 1050 (8th

Cir. 1986), the Eighth Circuit upheld a Missouri statute prohibiting Kansas City policy officers (and *only* Kansas City police officers) from participating in or contributing to political causes and campaigns. In upholding the statute, the Eighth Circuit ruled that the equal protection clause protects people, not places:

> So long as all persons within the jurisdictional reach of the statute are equally affected by the law, it matters not that those outside the territorial reach of the law are free to behave differently.

796 F.2d at 1053. More directly on point is *Potts v. McCastlain*, 240 Ark. 654, 655, 401 S.W.2d 220, 221–22 (1966), *cert. denied*, 358 U.S. 946, 87 S. Ct. 319 (1966). In that case, the Arkansas Supreme Court upheld a privilege tax on taxicabs (and *only* taxicabs), ruling that the equal protection clause only requires the tax to be collected impartially from all similarly situated *persons*. Thus, since all taxicab operators were subject to the tax, they were treated the same, and thus the threshold element of disparate treatment among individuals was lacking.

11. Plaintiffs attempt to meet this threshold element by asserting that, in application, ct 27 discriminates among individuals. Specifically, plaintiffs assert that the taxed services (MTS) traditionally are used by "small" consumers of long-distance telecommunication service, while the non-taxed services (Private Line and WATS) traditionally are used by "large" consumers, such as businesses. Plaintiffs offered no demographic or statistical evidence to support this contention, but even assuming that it is true, one established fact rebuts this argument: *All* types of services, both taxed and non-taxed, are available to *all* customers if they choose to subscribe to them. Granted, it would seem that the decision whether to subscribe to a Private Line or WATS service would be driven by economic considerations. Why, for example, would the traditional residential user subscribe to these presumably more costly types of service? To answer this question,

the Court would be substituting its own, particular judgment of what is rational and what is irrational for the judgment of the residential user, who best knows his or her own situation. Rationality is, after all, a relative concept. A decision that appears ridiculous to one may make absolute sense to another. Courts as factfinders can only find fact, and the fact here is that all services are available to all customers. If the non-taxed services actually were restricted in availability to certain classes of customers, then plaintiffs would establish the threshold element. However, this simply is not the case.

12. Furthermore, assuming *arguendo* that plaintiffs could meet the threshold elements of an equal protection challenge through their classifications of "small" and "large" consumers of long-distance telecommunication services, nonetheless plaintiffs' equal protection challenge fails on the merits. In attacking a state action on equal protection grounds, and where, as here, the "rational basis" standard is applicable, plaintiffs bear the heavy burden of overcoming the presumption of Act 27's validity as being rationally related to a legitimate state purpose. [3] *Streight*,

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[3] Of course, if the disparate treatment infringes upon a so-called "fundamental right," then the burden shifts to the state to establish a "compelling state interest" for the disparate treatment. Earlier in these proceedings, plaintiffs attempted to invoke this higher standard by positing that the tax infringes on their right to free speech, guaranteed under the first amendment of the federal constitution. Plaintiffs' First Amended Complaint, ¶23(b). It appears that plaintiffs abandoned this particular argument, since it is not addressed in their trial brief, which addresses their equal protection claim only from the standpoint of "rational basis" analysis. However, even if plaintiffs did not intend to waive their "fundamental interest" argument, nonetheless it is untenable. Again assuming *arguendo* that plaintiffs meet the threshold elements of an equal protection challenge, the "fundamental interest" of free speech is not implicated in this case. In the first place, freedom of speech is not absolute; it is a relative right that may be modified or regulated in the interplay with the constitutional rights of others. *American Communications Association v. Douds*, 339 U.S. 382, 70 S. Ct. 674 (1950). In this regard, it is unquestionable that the State has the constitutional right to impose taxes. In this case, the tax is imposed on certain types of long-

280 Ark. 206, 213, 655 S.W.2d 459, 463 (1983). In addressing this issue, the Court is constrained to recognize that a state's power of taxation is broad, particularly with respect to differentiation among the subjects of taxation:

> A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937), *quoted in Dicks v. Naff*, 255 Ark. 357, 359, 500 S.W.2d 350, 353 (1973).

13. The Arkansas Supreme Court applied precisely this test in the relatively recent *Streight* decision, where it upheld a state statute exempting from income taxation certain retirement income of state and federal public employees, over the challenge that the statute violated equal protection by according disparate treatment to those receiving private retirement benefits. In articulating the rational basis standard, the Court essentially paraphrased the burden-of-proof language quoted from *Carmichael*, above, and specifically noted that under this standard the judiciary may hypothesize freely to determine a conceivable basis for the differentiation. 280 Ark. at 213-14, 655 S.W.2d at 464. The Court then proceeded with such hypothetical analysis,

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distance telecommunication *services*. The tax is imposed on those types of services regardless of the *content* of the message, or *by whom* the message is transmitted. These are the elements that must be present in order to mount a successful claim that a state action infringes or free speech. *Arkansas Writers' Project, Inc. v. Ragland*, ___ U.S. ___, 107 S. Ct. 1722, 1727 (1987) (content); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365 (1983) (identity). These elements simply are not present in this case.

reasoning that the legislature may have determined that the exemption was needed to lure retirees to Arkansas, and that the exemption may have been narrowly drawn to exclude other types of retirees because those other types of retirees are not as well organized a public service retirees, and hence the "lure" would be ineffective as to them. 280 Ark. 214–15, 655 S.W.2d at 464.

14. Applying this same hypothetical analysis, and using the very "small–large" differentiation upon which plaintiffs base their equal protection claim, it is not at all difficult to imagine the type of "rational basis" that would pass constitutional muster. If, as plaintiffs assert, the non–taxed services accord an advantage to "large" consumers of long–distance telecommunication service, such as businesses and industry, then the legislature may have intended this in order to provide an incentive to keep existing businesses and industries here, as well as attracting new ones. Businesses that use WATS service to contact and be contacted by their interstate customers thus would benefit from the exemption, as would businesses that employ Private Line service to inter–connect out–of–state offices and computer equipment.

15. Using tax breaks as a means of achieving this end certainly is not a new or revolutionary device. As early as 1925, the legislature proposed and the voters approved a constitutional amendment providing a seven–year tax exemption for new textile mills established in the state. Ark. Const. Amend. 12. This amendment is still on the books. More recently, in 1983 the legislature passed and the governor approved so–called "enterprise zone" legislation to give tax breaks to industries that locate in economically depressed areas. Ark. Code Ann. § 15–4–807. Also, the motion picture industry enjoys a sales tax exemption to promote movie–making in this state. Ark. Code Ann. § 26–52–402(c)(3). Finally, the steel industry is encouraged through tax benefits provided for the construction of steel mills in Arkansas. Ark. Code Ann. § § 15–4–1101 *et seq.*

16. Thus, taking plaintiffs' "small-large" customer classification in the light most favorable to them, nonetheless they have failed to demonstrate that the exemptions accorded the types of interstate long-distance services, which presumably benefit only "large" customers, are without a rational basis. Accordingly, their equal protection challenge fails.

II. Commerce Clause

17. Plaintiffs' second claim that Act 27 violates the commerce clause of the United States Constitution is governed by the United States Supreme Court's recent decision in *Goldberg v. Sweet*, 57 U.S.L.W. 4070 (Jan. 10, 1989), where that Court upheld a virtually identical tax levied by Illinois, [4] applying the four-part test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977). That four-prong test contains the following elements:

(a) Whether the taxed activity is sufficiently connected to the state;

(b) Whether the tax is fairly apportioned to local activities within the state;

(c) Whether the tax discriminates against interstate commerce; and

(d) Whether the tax is fairly related to benefits provided to the taxed entity.

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[4] The Illinois statute at issue in *Goldberg* imposes a tax on the gross charge of interstate telecommunications that (1) originate or terminate within Illinois and (2) are charged to an Illinois service address, regardless of where the call is billed or paid. 57 U.S.L.W. at 4071.

430 U.S. at 280–87, 97 S. Ct. at 1079–83. *Goldberg*, 57 U.S.L.W. at 4071.

18. At the outset, the Court recognizes that interstate long–distance telecommunications are in interstate commerce, thus making scrutiny under the *Complete Auto* test appropriate. *See Goldberg*, 57 U.S.L.W. at 4072.

19. The first prong of the *Complete Auto* test holds that the taxed activity must be sufficiently connected to the state. This prong is commonly referred to as the "nexus" test. Act 27 imposes the Sales Tax on interstate long–distance telecommunications that (1) originate within this state, terminate outside this state, and are billed to an Arkansas telephone number or customer location, and (2) originate outside Arkansas, terminate within Arkansas, and are billed to Arkansas telephone numbers or customer locations. Ark. Code Ann. § 26–52–301(3)(A)(iii)(b), (c). Thus, the tax here is essentially identical to the Illinois tax at issue in *Goldberg*. *See*, n.4, *supra*. In *Goldberg*, the parties agreed that Illinois had a substantial nexus with the interstate telecommunications reached by the state's tax. 57 U.S.L.W. at 4072. Plaintiffs here offer no such concession, but there can be little doubt that Arkansas has a sufficient connection both to the taxable event and to the service location. In *Goldberg v. Johnson*, 117 Ill.2d 493, 512 N.E.2d 1262 (Ill. 1987), the decision ultimately affirmed by the United States Supreme Court, the Illinois Supreme Court ruled that the taxed activity had a substantial nexus to the state, thus meeting the first prong of *Complete Auto*. Since the structure of Act 27 is the same as that of the Illinois tax, it suffices to paraphrase the Illinois Supreme Court on the "nexus" issue:

> Not only does the taxable event transpire in [Arkansas] but the "gross charge" for the taxable event must be paid for in [Arkansas] or billed to an address in [Arkansas]. Consequently, [Arkansas] is exacting a tax only on those

> interstate communications which touch the State and which are actually paid for in [Arkansas] or are billed to service addresses located in [Arkansas].

512 N.E.2d at 1266. Accordingly, the Sales Tax here meets the first prong of *Complete Auto*.

20. The second prong of the *Complete Auto* test is whether the tax is fairly apportioned to cover those aspects of the service that are associated with the State. On this issue, plaintiffs point specifically to the provision of Act 27 that subjects to the tax "all customer access line charges billed to an Arkansas telephone number." Ark. Code Ann. § 26-52-301(3)(A)(v). Plaintiffs argue that, to the extent this provision applies to any access charge imposed by the out-of-state LEC, Act 27 does not meet the second prong of the test.

21. The Illinois tax at issue in *Goldberg* also applied to access charges levied by out-of-state LEC's. In upholding the tax on the apportionment issue, the Supreme Court, nothing that there is no single, constitutionally mandated apportionment formula, analyzed the tax to assure that it is externally and internally consistent. 57 U.S.L.W. at 4072.

22. Internal consistency requires that the tax be structured so that if every state were to impose an identical tax, no multiple taxation would result. *Id.* In *Goldberg*, the Supreme Court concluded that --

> the Tax Act is internally consistent, for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call.

Id. Turning to Act 27, it is clear that the same conclusion must

follow. By its terms, the tax on interstate telecommunications is limited to those billed to "an Arkansas telephone number or customer location." Ark. Code Ann. § 26-52-301(3)(A)(iii)(b), (c). Accordingly, applying *Goldberg*, the tax is fairly apportioned and Act 27 is internally consistent.

23. Likewise, Act 27 is externally consistent. External consistency turns on whether the State is taxing only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 57 U.S.L.W. at 4072. In *Goldberg*, the appellants contended that a tax on the entire gross charge of an interstate activity *a fortiori* does not reflect in-state business activity and thus is unapportioned. *Id.* But the appellee argued, and the Supreme Court agreed, that the tax was for all intents and purposes a sales tax, "assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call." *Id.* at 4072-73. Thus, the Court concluded, "Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, . . . the Tax Act reasonably reflects the way that consumers purchase interstate calls." *Id.* at 4073 (citations omitted)

24. Additionally, the Court rejected the notion that inter-state calls are exposed to taxation by other states. The Court stated, first, that neither a state through which a call passes nor a state at which a call terminates has a substantial nexus for that state to tax the call. *Id.* Second, the Court stated that only two states have a substantial nexus for taxing purposes: a state like Illinois that taxes the origination or termination of a call that is charged to a service address in Illinois, and a state *like Arkansas* that taxes the same types of calls that are billed or paid within Arkansas. *Id.*, citing Ark. Code Ann. § 26-52-301(3). While the Court recognized a small risk of multiple taxation as between these two types of states (57 U.S.L.W. at 4073, n. 13), the risk is so limited that it would not work to invalidate the tax scheme. Id.

Moreover, the Court recognized that the Illinois tax statute contained a specific credit provision that avoids this limited risk. *Id.*

25. In concluding that the Illinois tax met the external consistency test, the Court also rejected apportionment on a mileage or geographic basis. Contrasting the various transportation tax cases, which dealt with "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State," the Court reasoned that apportionment based on mileage or geography of individual telephone calls would produce "insurmountable administrative and technological barriers, due to the intangible nature of the movement of telephone calls through commerce. *Id.* The Court concluded that the Illinois tax was "a realistic legislative solution to the technology of the present-day telecommunications industry." *Id.*

26. Counseled by the Supreme Court's rationale in *Goldberg*, this Court perceives no distinguishing characteristic on the external consistency issue that would lead to a different result here. Act 27 *is* a sales tax and "reasonably reflects the way that consumers purchase interstate calls." *Goldberg*, 57 U.S.L.W. at 4073. Furthermore, since the Supreme Court itself blessed the Arkansas tax as one that falls within the contours of the nexus test, in the context of external consistency, this Court would be hard pressed to find otherwise here. Accordingly, the risk of multiple taxation is as small here as with the tax at issue in *Goldberg*. Plaintiffs failed to introduce any evidence that any taxpayer in Arkansas or elsewhere was ever subjected to multiple taxation as a result of Act 27. Furthermore, although *Goldberg* does not require the specific credit provision found in the Illinois statute, the same protection against multiple taxation is provided through Arkansas' membership in the Multi-State Tax Compact, which ensures against multiple taxation. This is buttressed by the testimony of Mr. Hawkins, who stated that in all instances of potential multiple taxation, the State would defer its own tax.

Finally, as the Supreme Court noted, alternative allocation methods based on mileage or geography cannot feasibly be implemented, given the intangibles and complexities inherent to current telecommunication technology. Since the Illinois tax applied to access charges, just as Act 27 does here, obviously this particular part of the Supreme Court's ruling in *Goldberg* controls the question whether access charges should be apportioned. Accordingly, following *Goldberg*, Act 27 also is externally consistent, so that the second prong of the *Complete Auto* test also is met.

27. The third prong is whether the tax discriminates against interstate commerce. Such discrimination could occur in two ways. First, if Act 27 taxed only interstate long-distance communications, but not intrastate long-distance communications, discrimination would be facial. This, however, is not the case: Act 27 specifically provides that intrastate long distance telecommunications are subject to the tax. Ark. Code Ann. § 26-52-301(3)(A)(iii)(a). *See Goldberg*, 57 U.S.L.W. at 4073. The second form of discrimination could occur where the interstate long-distance telecommunications bear a disproportionately larger share of the tax burden. Plaintiffs posit this argument here, relying on the United States Supreme Court's decision in *American Trucking Assns. Inc. v. Scheiner*, ___ U.S. ___, 107 S. Ct. 2829 (1987). In *Scheiner*, the Court invalidated Pennsylvania's flat tax on trucks operated on the state's highways as discriminatory against interstate commerce. That decision led to the invalidation of a similar Arkansas highway truck tax. However, in *Goldberg*, the Supreme Court distinguished *Scheiner* on two grounds. First, the tax in *Scheiner* burdened out-of-state truckers who did not have the same access to legislative change as do the Illinois telecommunications users, who are the burdened parties and who are Illinois residents. *Goldberg*, 57 U.S.L.W. at 4074. Second, *Scheiner* dealt with a measurable activity -- truck mileage on state highways. *Id.* In contrast, *Goldberg* focused on the "exact path of thousands of electronic signals [that] can be neither traced nor recorded." *Id.* Accordingly, the Supreme Court upheld the Illinois

tax on the third element of the Complete Auto test. *Id.* Following *Goldberg*, Act 27 thus meets the third prong of *Complete Auto*.

28. The fourth prong of the *Complete Auto* test focuses on the relationship of the tax to the benefits provided the taxpayer by the State. Again applying *Goldberg*, there is a sufficient relationship between the taxed event -- an interstate long-distance telecommunication -- and the benefits accorded by Arkansas. Certainly, calls originated within Arkansas meet this prong because origination is "perhaps the most critical step in the taxable event [.]" *Goldberg v. Johnson*, 512 N.E.2d at 1267. Similarly, as to calls originated outside Arkansas that terminate at an Arkansas number, the mechanics that must occur in Arkansas in order for the call to reach its terminating point are just as critical. As the Supreme Court ruled in *Goldberg*:

> The tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity . . . . On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* government services, including those services from which it arguably receives no direct 'benefit.' " . . . . The fourth prong of *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue . . . .

57 U.S.L.W. at 4074 (citations omitted; emphasis in original). Accordingly, the Court proceeded to hold that the Illinois tax is fairly related to the benefits received by Illinois telephone customers, which go beyond the exact services provided to the equipment used in each interstate telephone call. We have precisely the same situation here, and *Goldberg* controls. Accordingly, Act 27 also meets the fourth prong of the *Complete*

Auto test.

29. The evidence of record and the precedent now available to the Court demonstrate that Act 27 satisfied the four-prong test articulated in *Complete Auto*. Thus, plaintiffs' claim that the tax violates the commerce clause must be rejected.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED and DECREED that plaintiffs' complaint be dismissed, with defendants' costs taxed against plaintiffs.

ENTERED this 19th day of May, 1989.

/s/ Ellen B. Brantley
Ellen B. Brantley
Chancellor
May 19, 1989

APPENDIX F

CONSTITUTION OF ARKANSAS.

Art. 7 (Judicial Article)

§ 1. Judicial power vested in courts.

The judicial power of the State shall be vested in one Supreme Court, in circuit courts, in county and probate courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and, when deemed expedient, may establish separate courts of chancery.

* * *

§ 4. Jurisdiction and powers of Supreme Court.

The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedes, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and, other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs.

* * *

§ 9. Special judges.

In case all or any of the judges of the Supreme Court shall be disqualified from presiding in any cause or causes the court or the disqualified judge shall certify the same to the Governor, who shall immediately commission the requisite number of men learned in the law to sit in the trial and determination of such causes.

* * *

APPENDIX G

Selected Portions of the Arkansas Code Annotated of 1987 (Ark. Code Ann. § 26-52-301(3)(A) (as in effect both before and after amended by § 2 of Act 27 of 1987, on February 11, 1987) (Gross Receipts (Sales) Tax)

Before Amendment:

26-52-301. Tax levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

* * *

(3)(A) Service by telephone and telegraph companies to subscribers or users, including transmission of messages, whether local or long distance. This shall include all service and rental charges having any connection with transmission of any message.

* * *

After Amendment:

26-52-301. Tax levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

* * *

(3)(A)(i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.

(ii) Taxable services shall include basic local service and rental charges, including all installation and construction charges and all service and rental charges having any connection with transmission of any message or image.

(iii) Except as provided in subdivision (3)(iv) of this section, taxable long distance services shall include:

(a) Long distance messages which originate and terminate within this state;

(b) Interstate long distance messages which originate within this state and terminate outside this state and are billed to an Arkansas telephone number or customer location;

(c) Interstate long distance messages which originate outside of this state and terminate within this state and are billed to an Arkansas telephone number or customer location.

(iv) However, the following services shall not be subject to the tax:

(a) Any interstate private communications service which is not accessible by the public;

(b) Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

(c) Any interstate-wide area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunications service in a specified area which is

outside the state in which the station provided with this service is located.

(v) This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. However, access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

APPENDIX H
Act 27 of 1987

State of Arkansas
76th General Assembly
Regular Session, 1987
By: Senator Gibson

A Bill

SENATE BILL 196

As engrossed 1-28-87 As engrossed 1-28-87 As engrossed 2-9-87

For An Act To Be Entitled

"AN ACT TO REQUIRE COLLECTION OF THE ARKANSAS COMPENSATING (USE) TAX BY OUT-OF-STATE VENDORS WHO SOLICIT ARKANSAS SALES BY MEANS OF ADVERTISEMENTS IN NEWSPAPERS, MAIL ORDER OR CATALOG PUBLICATIONS, RADIO OR TELEVISION; TO REQUIRE COLLECTION OF THE ARKANSAS GROSS RECEIPTS TAX BY PROVIDERS OF INTERSTATE TELECOMMUNICATIONS SERVICES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

* * *

SECTION 2. Subsection (c)(1) of Section 3 of Act 386 of 1941, as amended, [Ark. Stat. Ann. § 84-1903(c)(1)], is hereby amended to read as follows:

(c)(1) Service by telephone, telecommunications and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance. Taxable

services shall include basic local service and/or rental charges, including all installation and construction charges and all service and rental charges having any connection with transmission of any message or image. Except as provided below, taxable long distance services shall include (a) long distance messages which originate and terminate within this State; (b) interstate long distance messages which originate within this State and terminate outside this State and are billed to an Arkansas telephone number or customer location; (c) interstate long distance messages which originate outside of this State and terminate within this State and are billed to an Arkansas telephone number or customer location. Provided however, the following services shall not be subject to the tax:

1. Any interstate private communications service which is not accessible by the public.

2. Any interstate service which allows access to private telephone lines and which is not accessible by the public; or

3. Any interstate wide area telecommunications service or other similar service which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunications service in a specified area which is outside the state in which the station provided with this service is located.

This tax shall apply to all customer access line charges billed to an Arkansas telephone number. Access line charges are those charges associated with or for access to the long distance network. Provided, however, that access or other telecommunication services provided to telephone, telegraph, or telecommunications companies which will be used to provide telecommunications services shall not be subject to this tax.

SECTION 3. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 4. EMERGENCY. It is hereby found and determined by the General Assembly that in-state sellers of property and services are being discriminated against as a result of out-of-state vendors, who solicit sales by advertisements, not being required to collect and pay to the State compensating (use) tax upon such sales that, as a result of the foregoing, this State is being deprived of much-needed revenue to which it is rightfully entitled; that providers of interstate telecommunication services have not been required to collect and remit gross receipts tax on interstate access and long distance telecommunications services which are hereby declared to be subject to the gross receipts tax. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

/s/ Gibson

APPROVED BY/s/ Bill Clinton
GOVERNOR

2/11/87

APPENDIX I

ARKANSAS CODE OF JUDICIAL CONDUCT

(The Arkansas Code of Judicial Conduct was adopted by the Arkansas Supreme Court by *per curiam* orders of November 5, 1973 and June 6, 1988, with a few modifications, from the Code of Judicial Conduct promulgated and adopted by the House of Delegates of the American Bar Association on August 16, 1972)

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to

convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. ADJUDICATIVE RESPONSIBILITIES

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a

proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

* * *

C. DISQUALIFICATION.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

* * *

D. REMITTAL OF DISQUALIFICATION.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

* * *

CANON 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

A. POLITICAL CONDUCT IN GENERAL

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

* * *

(ADDENDUM)
COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. PART-TIME JUDGE

A part-time judge is a judge who served on a continuing or periodic basis, but is permitted by law to devote time to some other professional or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C;

(2) should not practice in the court on which he or she serves or in any other court in the same county over which a part-time judge presides. He or she should not appear as counsel on appeal in any case which originates or arises in the court over which he or she presides.

B. JUDGE PRO TEMPORE

A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

* * *

APPENDIX J

TRIAL TRANSCRIPT (R. 642–646)

(Transcript of oral discussion at the close of the trial among Chancellor Brantley (trial judge), taxpayers' counsel (Mr. Sayre) and counsel for AT&T (Mr. Schlumberger), while Chancellor Brantley orally expounded upon her reasoning in deciding the Equal Protection issue against the challenging taxpayers)

THE COURT: Are there any more facts I need to find or conclusions of law I need to reach?

MR. SAYRE: Your Honor, you said that the main difference between the WATS-like services and the MTS services, in your mind, was the billing structure.

THE COURT: Yeah, I did say that.

MR. SAYRE: And that is the basis on which the companies are able to administer the law and make their determination. Needless to say, I don't think it's quite as close a question as you do, but I wonder if there are any other factors that you would like...

THE COURT: May[be] I ought to get a suggestion.

* * *

THE COURT: Would anybody like to suggest since, perhaps, the record will not be as you would like it, such other differences that I could find exists between MTS and WATS and WATS-like services?

MR. SAYRE: We don't think there's any.

THE COURT: I understand you don't. I want to see what anybody else wants to say and then I want to see if I want to find that as a fact or not find it as a fact.

MR. SCHLUMBERGER: Now, as far as talking about MTS, when you say WATS you're including ... are you including all the tax exempt or non-taxed service?

THE COURT: I'm using what I understand today's jargon to be, which is WATS and WATS-like services. Right?

* * *

MR. SCHLUMBERGER: Right. But I think the basis ... you say that the structure of billing is different. I think you would be also correct in saying that, as a general rule, the WATS-like services are going to be used by the larger ...

THE COURT: Right. The billing structure is such that WATS is not attractive to a customer who does not have a high volume of usage.

MR. SCHLUMBERGER: Right.

THE COURT: I mean, once you get to that volume and you buy WATS, what you get when you buy WATS is the same thing I get when I buy MTS. That is, you can pick up a phone and you can dial somebody who's not here.

* * *

THE COURT: Right. I guess what Mr. Schlumberger is saying that he doesn't know of any real difference between WATS and MTS either, other than a billing structure which makes WATS practical only to those who are higher volume users.

* * *

MR. SCHLUMBERGER: In the conditions of the service there probably isn't any significant difference. I'd have to check the record on that myself. But ...

THE COURT: That's my only recollection of the testimony, and, frankly, I want this opinion to be honest. If the Supreme Court doesn't believe that is enough to allow a different taxing system, then I want them to reverse me. I mean, I do not find that you can tell any difference between MTS and WATS based on anything other than how they are billed, and your election to be billed one way or another depends upon the telephone service outside of local exchanges.

* * *